No. 18,890

United States Court of Appeals

For the Ninth Circuit

CECILIA E. SOULE, Executrix of the Estate of Walter N. Soule, Deceased,
Appellant,

vs.

KAHULUI RAILROAD COMPANY, a corporation,
Appellee.

APPELLEE'S ANSWERING BRIEF

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INTRODUCTION

Appellant has appealed from the District Court's denial of her motion for "construction" of the injunction entered by the District Court pursuant to the statutes and Supreme Court Admiralty Rules relating to limitation of shipowner's liability. Appellant now contends that her motion was not for construction of the injunction but for modification of it. She seeks to modify the injunction to allow her to implead appellee shipowner as a third party defendant in a suit against appellant now pending in the courts of the State of Hawaii. Apparently it is conceded that the injunction in its existing form prohibits such action.

This appeal is from the denial of the second of two motions filed by appellant in the District Court. On De-

cember 17, 1962, appellant moved the District Court to vacate the injunction to allow her to maintain, outside the limitation proceeding, an action under the Jones Act for the death of Captain Soule (Tr. p. 25). This motion was denied on February 15, 1963, by Judge Tavares of the District Court at the same time he denied a motion by the Toyofuku claimants for permission to proceed against appellee outside the limitation action (Tr. pp. 46 and 50). Exactly one month later, appellant filed the motion which is the subject of this appeal (Tr. p. 51).

It is clear from appellant's brief that she now seeks to allow the Toyofuku claimants to proceed against appellee outside of the limitation action. No sound reason has been advanced why appellant can do for the Toyofuku claimants what they cannot do for themselves.

One would think from appellant's discussion that this Court is faced with a new and novel issue on which there are no applicable statutes and no established case law. Appellant treats her appeal as one requiring this Court to venture into uncharted waters and to make law in a new field devoid of statutory or case authority. The only navigational aid offered to the Court is a scale upon which the Court is supposed to weigh the interests of appellee on the one side and the supposed interests of appellant and the State of Hawaii on the other.

Contrary to appellant's argument, this case is directly and specifically covered by statute, by the Supreme Court Admiralty Rules, and by an unbroken line of cases going back to the last century. In limitation cases where there is more than one claim and the total of such claims ex-

ceeds the limitation fund, the jurisdiction of the admiralty court is exclusive, and the shipowner is entitled to an injunction against any suits or proceedings outside of the limitation action.

Appellant is guilty of more than merely ignoring the unanimous weight of authority against her contentions. She is absolutely wrong in the two basic assumptions or premises upon which she bases her entire argument regarding the balancing of interests.

First: Neither the Toyofuku claimants nor appellant can assert a cause of action for wrongful death against appellee based upon the Hawaiian law or upon the general maritime doctrine of unseaworthiness. *The Jones Act (46 U.S.C. Section 688) provides the only remedy against an employer for the alleged wrongful death of a seaman.*

Second: The substantive law of Hawaii has no application whatsoever to claims against appellee for the deaths of Captain Soule and Mr. Toyofuku.

JURISDICTIONAL STATEMENT

On September 19, 1963, appellee moved the Court to dismiss this appeal on the ground that the appeal was not within the jurisdiction of the Court. Appellee's motion was denied by the Court on October 28, 1963.

The jurisdiction of the District Court to make the order appealed from is based on 46 *U.S.C.* Section 185 and the *Supreme Court Admiralty Rules,* including Rule 51.

STATEMENT OF THE CASE

Appellant's statement of the facts out of which this appeal arises is substantially correct for the purposes of this appeal. Appellee will not urge corrections which will not affect the issues involved in the appeal, even though such matters may be important upon trial of the case. Appellee would, however, offer the following additions and corrections to appellant's statement:

1. Appellee has not, and does not, concede any responsibility or liability for losses arising out of the casualty of May 11, 1962. Appellee's petition in the District Court asks for exoneration from liability or, in the alternative, limitation of liability if the Court finds it is liable at all (Tr. p. 1).

2. Three claims totaling more than $650,000.00 have been filed in the limitation case in the District Court. These claims are as follows:

Claim of appellant Cecilia E. Soule (Tr. p. 23) $300,000.00;

Claim of Florence Toyofuku (Tr. p. 17) $350,000.00;

Claim of Matson Navigation Company in an unspecified amount for indemnity and/or contribution against suits filed against it arising out of the casualty. Matson's claim alleged that suits filed against it totaled $1,400,000.00 at the time the claim was filed (Tr. p. 33).

ARGUMENT

I.

THE DISTRICT COURT, SITTING AS A COURT OF ADMIRALTY, HAS EXCLUSIVE JURISDICTION OF CLAIMS AGAINST APPELLEE KAHULUI RAILROAD COMPANY ARISING OUT OF THE SINKING OF THE WILLIAM WALSH.

A. The Procedure in Limitation of Liability Cases Is Set by the Limitation Statutes and Supreme Court Admiralty Rules.

The United States has had limitation of liability statutes in substantially the same form since 1851. These statutes and the Supreme Court Admiralty Rules which implement them have two basic purposes:

(1) To limit a shipowner's liability arising out of a maritime casualty or disaster to the value of the vessel after the casualty or disaster, together with freights earned on the voyage.

(2) To provide for a single admiralty proceeding in which:

(a) The amount of the limitation fund is determined;

(b) The shipowner's liability, if any, is determined;

(c) The shipowner's right to limitation of liability is determined;

(d) The limitation fund may be apportioned among the various claimants if liability is found and limitation granted.

46 *U.S.C.* Sections 183, 184, 185;

Supreme Court Admiralty Rules 51, 52;

The Quarrington Court, 102 F. 2d 916 (2d Cir. 1939) cert. den. 307 U.S. 645, 83 L. Ed. 1525.

> "The statutory provision for limitation of liability . . . has been broadly and liberally construed in order to achieve its purpose to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner." *Just v. Chambers,* 312 U.S. 383, 385, 85 L. Ed. 903, 905 (1941)

It is apparent that the purposes of the limitation of liability statutes cannot be attained in the standard (multiple claim-inadequate fund) limitation situation unless all claims against the shipowner are brought together in one action.

> "If an admiralty court in a multiple-claims-inadequate-fund case may permit the claimants first to try the issue of liability vel non and damages in every claim in court actions outside of the limitation proceeding during which time the limitation case will be in a suspensive state of limbo, there will be little, if anything, left of the statutory scheme created by Congress and implemented by Admiralty Rules contemplated in the statutes." *Pershing Auto Rentals, Inc. v. Gaffney,* 279 F. 2d 546, 549-550 (5th Cir. 1960)

For this reason, Congress has specifically provided that, when the shipowner properly invokes the benefit of the limitation statutes by filing his petition in the District Court, actions or proceedings against him outside the limitation case must cease. The last sentence of 46 *U.S.C.* Section 185 reads:

> "Upon compliance with the requirements of this section, all claims and proceedings against the owner with respect to the matter in question shall cease."

Section 185 is clear enough, but Supreme Court Admiralty Rule 51 goes further to insure that all claims against the shipowner be localized in the limitation action. After setting forth in detail the form of petition to be filed, notices to be given, etc., Rule 51, in its last paragraph, provides for the issuance of an injunction by the District Court—an injunction against the prosecution of any suit against the shipowner outside of the limitation action. The portion of Rule 51 referred to reads as follows:

> "The said court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding."

The limitation of liability statutes are constitutional. *Hartford Accident & Indemnity Co. v. Southern P. Co.*, 273 U.S. 207, 71 L. Ed. 612 (1927). The Supreme Court held, as early as 1872, that limitation of liability cases are within the jurisdiction of the District Court in admiralty. *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104, 20 L. Ed. 585 (1872).

B. The Jurisdiction of the Admiralty Court Is Exclusive in the Standard Limitation Case.

Appellee knows of no case holding that a claimant may assert a claim against a shipowner outside the limitation action in the standard (multiple claim-inadequate fund) limitation situation. Appellant has not cited such a case in the District Court or in her brief. The cases are unanimous in holding that claimants must come into the limitation proceeding and assert their claims there. Among the many cases so holding are:

Metropolitan Redwood Lumber Co. v. Doe, 223 U.S. 365, 56 L. Ed. 473 (1912), where the Supreme Court said at page 372:

"The appellant, owner of The San Pedro, appears to have proceeded strictly in compliance with the fifty-fourth admiralty rule [now Admiralty Rule 51]. There was a due appraisement of The San Pedro and her pending freight, and a stipulation entered into, with sureties, for the value so appraised, and monition duly issued, requiring all persons to present their claims and make proof. In that situation, the jurisdiction of the court to hear and determine every claim in that proceeding became exclusive. It was then the duty of every other court, Federal or State, to stop all further proceedings in separate suits upon claims to which the limited liability act applied."

The Quarrington Court, 102 F. 2d 916 (2d Cir., 1939) cert. den. 307 U.S. 645, 83 L. Ed. 1525. At page 918 the Court said:

"The purpose of a limitation proceeding is not merely to limit liability but to bring all claims into concourse and settle every dispute in one action."

Pershing Auto Rentals, Inc. v. Gaffney, 279 F. 2d 546 (5th Cir. 1960)

Petition of Trinidad Corp., 229 F. 2d 423 (2d Cir. 1955) in which the following statement appears at page 428:

"It is, of course, true that in limitation cases in which the sum total of damages as liquidated may exceed the fund available for the payment of claims, the concourse of all claimants in the limitation proceed-

ing is a technique indispensable to the statutory objective, viz., a marshalling of claims.''

Petition of Tracy, 86 F. Supp. 306 (D.C., E.D.N.Y. 1949)

Needless to say, the instant case is one involving the standard limitation situation of multiple claims and an inadequate fund. Three claims have been filed for a total of more than $650,000.00 (Tr. p. 42). The limitation fund is $318.00 (Tr. pp. 11-12, 15).

C. The Limitation Statutes Prevail Over the Savings to Suitors Clause in the Standard Limitation Situation.

Appellant bases her entire argument on the savings to suitors clause of 28 *U.S.C.* Section 1333. Her reliance on Section 1333 is without merit for a number of reasons.

In the first place, Section 1333 saves ''remedies'' not ''rights''. Neither appellant nor the Toyofuku claimants have any common law ''rights'' against appellee, and Section 1333 wouldn't save such ''rights'' if they existed. This subject will be discussed at greater length in subsequent sections of appellee's brief.

Secondly, the authorities are clear that the limitation of liability statutes and procedures prevail over the savings clause in the standard limitation situation. It is elementary that this is true—every limitation case tried results in the claimants being deprived of an opportunity to assert their claims outside the admiralty court. In Gilmore and Black, *The Law of Admiralty*, 1957, the authors address themselves to this situation at pages 687 and 688 (Sections 10-16 and 10-17):

(Sec. 10-16) "The last sentence of Section 185 provides that on compliance with its requirements (i.e. filing a petition within the six months period together with paying into court or posting a bond for the value of the ship or transferring the ship to a trustee) 'all claims and proceedings against the owner with respect to the matter in question shall cease.' Section 1333 of the Judicial Code confers upon the District Courts exclusive original jurisdiction of any civil case of admiralty or maritime jurisdiction 'saving to suitors in all cases all other remedies to which they are otherwise entitled.' The two provisions are in obvious conflict. On the whole the policy of the Limitation Act has prevailed, so that in most limitation situations the 'suitors' are in fact deprived of their choice of forum."

(Sec. 10-17) "The case law admits the owner's right to localize proceedings in the standard limitation situation: a multiplicity of claims, usually resulting from a maritime catastrophe, which in the aggregate clearly exceed the liability of the owner under the Limitation Act. In that situation, the admiralty court, on the filing of the petition and compliance with the provisions for a limitation fund, will enjoin the continuance of any pending actions against the owner as well as the institution of any new actions. Claimants are required to make proof of claim in the limitation proceeding and to litigate their rights in that proceeding."

Appellant has cited three cases where claimants were allowed to pursue their claims outside the limitation proceedings. None involves the standard limitation situation—a fact appellant completely overlooks.

The Green decisions (*Ex Parte Green*, 286 U.S. 437, 76 L. Ed. 1212 (1932) and *Langnes v. Green*, 282 U.S. 531, 75 L. Ed. 520 (1931)) were actually rendered in one case. The important point in the case is that there was but *one* claim—there were not multiple claimants. In the course of its opinion in *Langnes v. Green*, the Supreme Court noted that the state court remedy must be denied in the standard limitation situation.

Lake Tankers Corp. v. Henn, 354 U.S. 147, 1 L. Ed. 2d 1246 (1957) is not really a limitation case at all. There the claimants reduced their claims so that the total of all claims was *less than the limitation fund.* But once again the Supreme Court pointed out that the result would be different—claimants would not be allowed to pursue their claims outside the limitation proceedings—where there were multiple claims and a fund not large enough to pay all in full. At pages 151 and 152 the Supreme Court said:

> "It is, therefore, crystal clear that the operation of the Act is directed at misfortunes at sea where the losses incurred exceed the value of the vessel and the pending freight. And as is pointed out in British Transport Co. (U.S.) supra, where the fund created pursuant to the Act is inadequate to cover all damages and the owner has sought the protection of the Act, the issues arising from the disaster could be litigated within the limitation proceeding. Otherwise the purpose of the Act, i.e., limitation of the owner's liability, might be frustrated. Only in this manner may there be a marshalling of all of the statutory assets remaining after the disaster and a concourse of claimants."

II.

APPELLEE'S LIABILITY, IF ANY, IS NOT DETERMINED BY THE LAW OF HAWAII.

Appellant is not content with ignoring the host of cases which support the action of Judge Tavares in denying her motion. In order to give some semblance of logic to her argument, she misapplies the savings clause and repeatedly misstates the law applicable to suits against an employer for the death of a seaman. Time after time appellant refers to the Hawaiian wrongful death statutes; time after time she speaks of the substantive law of Hawaii. These statements and references are absolutely irrelevant. Captain Soule and Mr. Toyofuku were seaman (Tr. pp. 17 and 23). Actions for their deaths against appellee, their employer, are governed by federal law, not state law. The Hawaiian wrongful death statutes and the laws of Hawaii dealing with contribution between tort feasors are wholly inapplicable and immaterial.

A. The Jones Act Is the Exclusive Remedy Against the Employer for Death of a Seaman.

The Jones Act (46 *U.S.C.* Section 688), passed by Congress in 1920, gives certain heirs of a deceased seaman a cause of action for negligence against the employer. This cause of action is exclusive and provides the only cause of action for wrongful death against the seaman's employer. There is no cause of action against the employer based upon the doctrine of unseaworthiness, and no cause of action can be stated on the state death statutes. Norris, *The Law of Seamen*, 2d Ed. (1962), p. 813, Sec. 668.

> "It is plain that the Merchant Marine Act is one of general application intended to bring about the

uniformity in the exercise of admiralty jurisdiction required by the Constitution, and necessarily supersedes the application of the death statutes of the several states." *Lingren v. United States*, 281 U.S. 38, 44, 74 L. Ed. 686, 691 (1930)

"Since the Jones Act withholds any action for death due to unseaworthiness and prevents the assertion of any such right of action under state law, no means of recovery for death due to unseaworthiness is available to the seaman's representative under federal or state law." *Bath v. Sargent Line Corp.,* 166 F. Supp. 311, 312 (D.C., S.D.N.Y. 1958)

Appellant cites a number of cases which she believes support her theory that the Soule and/or Toyofuku claimants may assert a claim against appellee for wrongful death based on the laws of the state of Hawaii. But not one of these cases is authority for that proposition. Not one of the cases cited involves a claim against an employer for death of a seaman occurring since the passage of the Jones Act in 1920.

The Schooner Robert Lewers Co. v. Kekauoha, 114 F. 849 (9th Cir., 1902) cited on pages 13 and 24 of appellant's brief involved a truckman killed on a dock. It did not involve a seaman and the death occurred before passage of the Jones Act.

The Tungus v. Skovgaard, 358 U.S. 588, 3 L. Ed. 2d 524 (1959) cited on pages 18 and 24 of appellant's brief involved a suit against a shipowner by the administratrix of the employee of a terminal operator. The deceased was not a seaman, hence was not covered by the Jones Act.

Just v. Chambers, 312 U.S. 383, 85 L. Ed. 903 (1941) cited at brief, page 24, did not involve claims for wrongful death at all. There the issue was the survival of personal injury actions against a deceased shipowner, a matter not involved with the Jones Act at all.

Western Fuel Co. v. Garcia, 257 U.S. 233, 66 L. Ed. 210 (1921) cited at brief, page 24, was an action for the death of a stevedore—not a seaman.

Appellant is absolutely wrong in asserting that she or the Toyofuku claimants has a cause of action against appellee based on the law of Hawaii. Congress has preempted the field in the area of actions against the employer for death of a seaman. The Jones Act provides the only basis for such a cause of action.

Lingren v. United States, supra.
Bath v. Sargent Line Corp., supra.

B. The Substantive Law of Hawaii Has No Application.

The rights and liabilities of appellee as shipowner-employer on the one hand and the Soule and Toyofuku claimants on the other cannot be affected by the substantive law of Hawaii. Appellant apparently believes otherwise. One cannot tell from her brief whether this mistake is due to a failure to appreciate that the Jones Act provides the only cause of action against the employer for wrongful death of a seaman (discussed above), or a misunderstanding of the savings to suitors' clause or both.

One only need read the savings to suitors' clause to see that "remedies" are saved, not "rights." Furthermore, it is firmly established that, when a maritime cause of

action is enforced by a common law remedy, *the substantive law applicable is that of admiralty—not that of the forum.*

Chelentis v. Luckenbach Steamship Co., 247 U.S. 372, 62 L. Ed. 1171 (1918)

Garrett v. Moore-McCormack Co., 317 U.S. 239, 87 L. Ed. 239 (1942)

Kossick v. United Fruit Co., 365 U.S. 731, 6 L. Ed. 2d 256 (1961)

Gilmore & Black, *The Law of Admiralty* (1957) p. 45, (Section 1-18).

Even if appellant or the Toyofuku claimants were allowed to pursue their Jones Act claims in the state court, the laws of Hawaii relating to joint tort feasors, several tort feasors and contribution would be inapplicable. The state court would be bound to apply the federal law on these subjects.

Possibly appellant confuses the savings to suitors' clause with the principle that, in matters of purely local concern, state law will be applied if admiralty has not already preempted the field. *In any event, the relations between seamen and their employers are not matters of local concern, (Garrett v. Moore-McCormack Co., supra; Kossick v. United Fruit Co., supra), and Congress has preempted the field relating to rights against the employer for death of a seaman (Lingren v. United States, supra).*

III.

ALLOWING APPELLEE TO BE IMPLEADED IN THE STATE COURT CASE WOULD SERVE NO USEFUL PURPOSE.

Appellant seeks an order allowing her to tender appellee to the Toyofuku claimants as a new defendant in an action pending in the courts of Hawaii. There are a number of reasons why impleader of appellee would be neither useful nor necessary:

1. The claims of the Toyofuku claimants against appellee are already being litigated. Florence Toyofuku has filed claims in the limitation proceeding in her capacity as administratrix of the Estate of Nobuyoshi Toyofuku, deceased, and on her own behalf and on behalf of her minor children (Tr. p. 17).

2. Mrs. Toyofuku also has urged the District Court to allow her to proceed against appellee outside the limitation proceeding. This relief was denied by Judge Tavares in his order of February 15, 1963, and the time to appeal from that order has expired (Tr. p. 50).

3. Appellant's request for relief should be directed to the state courts. If appellant will be prejudiced by having the state court action against her tried prior to a decision in the limitation case, she should ask the state court to stay its proceedings. The record does not show whether appellant has asked for such relief in the state court. It might also be pointed out that, but for appellant's motion of March 15, 1963, and this appeal, the limitation case could already have been tried and decided by the District Court.

In the last analysis, appellant's real complaint is that appellee, the shipowner, is receiving protection from the

limitation statutes which is denied to her as administratrix of her husband's estate. This is indeed unfortunate. However, Congress considered this problem and decided that masters, officers, and seamen should not receive any benefit of the limitation statutes. Such is the clear meaning of 46 *U.S.C.* Sec. 187.

CONCLUSION

The limitation statutes and the Supreme Court Admiralty Rules provide for a special proceeding in the multiple claim-inadequate fund situation. In such cases the shipowner is entitled to require that all claims be litigated in the limitation proceeding. The cases so hold without exception.

Appellant assaults the established procedure in limitation cases with the argument that the Hawaiian courts should be allowed to try claims against appellee *based upon the substantive law of Hawaii.* But, this argument fails because the premise is unsound. Neither appellant nor Mrs. Toyofuku can base any claim against appellee on the state law. The Jones Act preempts the field; it displaces the state law, and provides the only basis for any claims against appellee.

Appellee submits that the District Court was correct in denying appellant's motion, and that the order of the District Court should be affirmed.

Dated, San Francisco, California,
January 30, 1964.

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Proctors for Appellee.